91-1439

Supreme Court, U.S.
FILED
MAR 3 1992
OFFICE OF THE CLERK

No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

THOMAS BARTON SCHALK,

PETITIONER

VS.

STATE OF TEXAS,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE

COURT OF CRIMINAL APPEALS OF TEXAS

JOHN H. HAGLER
COUNSEL OF RECORD
State Bar No. 08696000
NEAL J. ROBINSON
3601 NCNB Plaza
901 Main Street
Dallas, Texas 75202
(214) 742-1201

February 29, 1992

QUESTIONS PRESENTED

1. Did the Court of Criminal Appeals of Texas err when it created a "unique circumstances" exception to permit a general search for computer technology contrary to the mandate of the Fourth Amendment to the U.S. Constitution?

2. Did the Court of Criminal Appeals err when it ruled that a statutory class definition of seizable items contained in a search warrant was sufficiently restrictive to satisfy the particularity requirement of the Fourth Amendment to the U.S. Constitution where: 1) members of the class were not recognizable by the reasonably competent executing officer; 2) not every item in the class represented evidence, instrumentalities, or fruits of a crime; and 3) the class was conceptually defined rather than the items specifically described?

3. Does the "good faith" exception to the Fourth Amendment exclusionary rule of *United States v. Leon* apply where a reasonably competent officer executing a search warrant knew, or should have known, the warrant authorized a general search?

LIST OF PARTIES

Thomas Barton Schalk, Appellant below and Petitioner herein.

The State of Texas, Appellee below and Respondent herein.

TABLE OF CONTENTS

QUESTIONS PRESENTED..... i

LIST OF AUTHORITIES..... iv

OPINION BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISION INVOLVED 2

STATEMENT OF THE CASE..... 2

REASONS FOR GRANTING THE PETITION 4

I. The Court of Criminal Appeals of Texas erred when it created a "unique circumstances" exception to permit a general search for computer technology contrary to the mandate of the Fourth Amendment to the U.S. Constitution. 4

II. The Court of Criminal Appeals erred when it ruled that a statutory class definition of seizable items contained in a search warrant was sufficiently restrictive to satisfy the particularity requirement of the Fourth Amendment to the U.S. Constitution where: 1) members of the class were not recognizable by the reasonably competent executing officer; 2) not every item in the class represented evidence, instrumentalities, or fruits of a crime; and 3) the class was conceptually defined rather than the items specifically described. 8

III. The State of Texas misconstrued the "good faith" exception to the Fourth Amendment exclusionary rule to apply where an executing officer, assisted or unassisted, is unable to recognize the item to be seized, and thus is, or should be, aware he is conducting a general search. 10

CONCLUSION 11

APPENDIX 13

Appendix I: Court of Appeals of Texas, Fifth District, Dallas, Opinion 13

Appendix II: Court of Criminal Appeals of Texas Opinion 36

Appendix III: Court of Criminal Appeals of Texas Petition for Rehearing Denied 59

LIST OF AUTHORITIES

Andresen v. Maryland, 427 U.S. 463 (1976) 4

Schalk v. Texas, 767 S.W.2d 441 (Tex. App.-Dallas 1988, pet. granted) ..... passim

Schalk v. State, No. 665-89 (Tex. Crim. App. Oct. 2, 1991), ... passim

Steele v. United States No. 1, 267 U.S. 498 (1925) 9, 10

United States v. Crozier, 777 F.2d 1376 (9th Cir. 1985) 11

United States v. Leon, 468 U.S. 897 (1984) 11

United States v. Nader, 621 F. Supp. 1076 (D.C. Dist. Col. 1985) 7, 11

United States v. Strand, 761 F.2d 449 (8th Cir. 1985) 11

CONSTITUTIONAL PROVISIONS

Fourth Amendment to the U.S. Constitution ..... passim

STATUTES AND RULES

28 U.S.C. Sec. 1254(1) 2

SUP.CT.R. 13.1 2

Texas Penal Code § 31.05 2

No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

THOMAS BARTON SCHALK,

PETITIONER

VS.

STATE OF TEXAS,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE

COURT OF CRIMINAL APPEALS OF TEXAS

Petititoner Dr. Thomas Schalk respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Criminal Appeals of Texas entered in the above entitled proceeding on October 2, 1991.

OPINION BELOW

The opinion of the Court of Appeals, Fifth District, Dallas, appears at 767 S.W.2d 441 (Tex. App.-Dallas 1988, pet. granted). See Appendix I. The conviction was affirmed by the Court of Criminal Appeals of Texas on October 2, 1991, Cause No. 665-89. That opinion is not yet published, but appears as Appendix II. The Appellant's Motion for Rehearing was denied on December 4, 1992. See Appendix III.

JURISDICTION

The Court of Criminal Appeals of Texas entered an opinion affirming Petitioner's conviction on October 21, 1991. Motion for Rehearing was timely filed on November 1, 1991. Motion for Rehearing was denied on December 4, 1991. Therefore, the petition for writ of certiorari was timely filed on or before March 3, 1992.

The jurisdiction of this Court to review the judgment of the Court of Criminal Appeals of Texas is invoked under 28 U.S.C. Sec. 1254(1) and SUP.CT.R. 13.1.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the U.S. Constitution provides as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

In Cause No. F85-98689-M Petitioner Dr. Thomas Schalk was charged with unlawfully making a copy of a magnetic tape containing the trade secrets of Texas Instruments ("TI") in violation of Texas Penal Code § 31.05.

After a jury found Petitioner guilty, the trial court sentenced Petitioner to two years confinement at the Texas Department of Corrections and assessed a fine of five thousand dollars ($5,000.00). The trial court probated the sentence for a period of two years.

Viewed in the light most favorable to the verdict, the evidence at trial established that Petitioner knowingly made a copy of computer files which were the trade secrets of TI. The evidence against Dr. Schalk consisted of a computer tape containing the files seized pursuant to a warrant and affidavit issued May 15, 1985. The search was executed on May 15–16, 1985, and the Return was filed May 20, 1985.

The warrant effectively authorized two searches: 1) a highly specific search for precisely described articles; and 2) a general search for anything which might contain a "trade secret" of TI. The Petitioner moved to suppress the tape seized pursuant to the portion of the search warrant which authorized the impermissibly general search for "trade secrets." The motion was denied and during trial, over objection, the magnetic tape was introduced into evidence.

The impermissibly general search, and the court's refusal to suppress the fruits of the search, gives rise to this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

I.

THE COURT OF CRIMINAL APPEALS OF TEXAS ERRED WHEN IT CREATED A "UNIQUE CIRCUMSTANCES" EXCEPTION TO PERMIT A GENERAL SEARCH FOR COMPUTER TECHNOLOGY CONTRARY TO THE MANDATE OF THE FOURTH AMENDMENT TO THE U.S. CONSTITUTION.

In the words of the court below, the Fourth Amendment to the U.S. Constitution requires that "the property must be so definitely described that the officer making the search will not seize the wrong property. The description should be sufficient to direct the officer which articles to select for seizure [,] the described from the generally inoffensive [sic], and not confer free-wheeling discretion upon the officer.[1] *Schalk v. State*, 767 S.W.2d 441, 452 (Tex. App.-Dallas 1988) (App. I, 31). "General warrants are of course prohibited by the Fourth Amendment". *Andresen v. Maryland*, 427 U.S. 463, 480 (1976).

The Court of Criminal Appeals of Texas nonetheless found the lack of particularity was justified because the search was for a "unique set of articles...that by their very nature [could] only be recognized by a very select and limited group of persons....[which] could...take several forms...;" and that to describe the articles would be to reveal them, thus destroying their "trade secret" nature. *Id.* (App. I, 32).

---

[1] The Court of Criminal Appeals specifically adopted the treatment of the Court of Appeals of Texas, Fifth District, Dallas, regarding the particularity requirement of the Fourth Amendment to the U.S. Constitution. *Schalk v. State*, No. 665-89, s. op. at 18 (Tex. Crim. App. Oct. 2, 1991) (App. II, 58). Therefore, references in this petition will be to both opinions, provided as Appendix I and Appendix II.

Unique circumstances, even if they exist, do not legitimize police or judicial disregard for the particularity requirement of the Fourth Amendment. Intellectual property existed prior to the ratification of the Bill of Rights in 1791. A search for intellectual property is not Constitutionally different from any other search. Such property is, and always has been, describable by: 1) its name; 2) charactersistics of form, language, or symbols; 3) function or purpose; and 4) materials or medium on which it is contained.

Further, the articles in this case were not unique. Only their characterization in the search warrant was unique. They were not described, but only defined using a conclusory conceptual legal characterization, "trade secrets." *Id.*, at 452-53 (App. I, 31-32).

Nor were they recognizable only by a very select and limited group of persons. The articles were common, everyday computer tapes, computer disks, computer printouts, and other specifically marked papers and memoranda. Great specificity in their description was possible without revealing their "trade secret" contents. In fact, articles thought to contain "trade secrets" were described in both the affidavit and the search warrant with a high degree of specificity, including their physical description ("magnetic tapes" and "documents marked 'TI Strictly Private' or 'TI Classified'), brand name ("Quadronix"), name label ("SPDIR.BCK, SPRGL.BCK, DRAFT.BCK, and Label: ADDR Copy used,'" and exact location, complete with pictures and a diagram. *Id.*, at 452 (App. I, 31).

This detail was possible because the complainant, Texas Instruments ("TI") through an informant (a fired employee of TI seeking re-employment), had obtained physical possession of many of the items (which TI reviewed and caused the informant to replace prior to seeking prosecution). TI and the state had exact physical descriptions of all of the articles for which they allegedly had probable cause to search, including pictures of them where located on Voice Control Partners' ("VCS") premises. *Id.*, at 444-46, 452 (App. I, 16-17, 31). Contrary to the statement in the opinion of the Court of Appeals, Dr. Schalk was not indicted for, nor convicted of, copying any

of the items specifically listed in the search warrant. *Id.* at 452 (App. I, 31); *Schalk v. State*, No. 665-89, s. op. at 2-3 (Tex. Crim. App. Oct. 2, 1991) (App. II, 38).

The search warrant, however, in addition to authorizing a search for these specific items, authorized generally the seizure of anything which might contain a "trade secret." 767 S.W.2d at 452-53 (App. I, 31-32). Under this general characterization, the executing officer, with the assistance of the TI employee, seized a total of 107 items containing thousands of files, papers, and effects. See Search Warrant Inventory. Most of the items seized were the "trade secrets" and property of VCS.

In order to recognize something as a "trade secret," the executing officer, or someone assisting, would have to have been able to determine that the statutory elements were present. That person would have to have been able to determine: 1) that the articles represented "scientific or technical information, design, process, procedure, formula, or improvement"; 2) that the articles had value; 3) that they were used in the owner's business; 4) that they provided a competitive advantage; 5) that the owner had taken measures to keep them secret; 6) that the articles were in fact secret; and 7) that they were not possessed with the effective consent of the owner. *Id.* at 445-46 (App. I, 18-19). These are all determinations to be made by a trier of fact in a court of law. That something is trade secret is a legal conclusion, not a description. The executing officer testified that he was unable to identify a "trade secret." The TI employee who searched Voice Control Partner's ("VCS") trade secret files on behalf of the police admitted that he could only recognize property that might belong to TI by some physical indicia of TI ownership. Clearly the reasonably competent executing officer cannot recognize a "trade secret."

Dr. Schalk was indicted for copying computer files contained on one magnetic tape (Search Warrant Inventory Item No. 6) which was seized pursuant to the general "trade secret" search. The magnetic tape was found on a shelf in a bookcase in his office, not in a box in a storage room in a separate part of the building where the police had

probable cause to search. It was Scotch brand tape, not the "Quadronix" brand the police had reason to believe might contain evidence. It contained the Label "VOL," not any of the labels the police had reason to believe identified tapes belonging to TI. It contained, among other files, files named LPCSPEAK1.FOR, LPCSPEAK2.FOR, LPCSPEAK3.FOR, LPCSPEAK4.FOR, AND RTSSPEAK3.FOR, which Dr. Schalk was convicted of copying. *Schalk v. State*, No. 665-89, s. op. at 2-3 (Tex. Crim. App. Oct. 2, 1991) (App. II, 38). It did not contain any of the file names which the police had probable cause to believe might be the property of TI, nor did it contain any of the files specifically listed in the search warrant or affidavit. It possessed no physical indicia of TI ownership.

The law is clear regarding a warrant which authorizes both a particular search and a general search. The two parts of the warrant must be severed, and those items seized pursuant to the impermissibly general search must be excluded. *United States v. Nader*, 621 F. Supp. 1076, 1079 (D.C. Dist. Col. 1985).

"Unique circumstances" exceptions to the Fourth Amendment particularity requirement have never, and should never, be tolerated. If permitted, the "unique" circumstances exception adopted by the Court of Criminal Appeals would authorize a search for, in an obscenity case for instance, "all of X's obscenity copied by Y now located in Z's shop," where there is no method to determine what is obscene, what is copied, or who is the owner. Such a search clearly does not meet the particularity standard of the Fourth Amendment. *Id.* The search permitted in Dr. Schalk's case, however, authorized an even more egregious Constitutional violation. The reasonably competent executing officer could be expected to recognize the depiction of a sex act, though not be expected to determine that it was legally obscene. He or she could not recognize a "trade secret."

If the "unique" circumstances exception is permitted to stand, the reasonable and justifiable expectation of privacy of all citizens and enterprises in their valuable intellectual property in this computer

age will not be protected. The Fourth Amendment to the U.S. Constitution will have been abolished as to that class of property.[3]

---

[3] The "unique circumstance" in this case were further used to justify cutting all communications with VCS's business, arresting all employees present, photographing them, and holding them incomunicado in a single small room for approximately five hours, all the while refusing their requests to speak with anyone, including their individual attorneys.

II.

THE COURT OF CRIMINAL APPEALS OF TEXAS ERRED WHEN IT RULED THAT A STATUTORY CLASS DEFINITION OF SEIZBLE ITEMS CONTAINED IN A SEARCH WARRANT WAS SUFFICIENTLY RESTRICTIVE TO SATISFY THE PARTICLARITY REQUIREMENT OF THE FOURTH AMENDMENT TO THE U.S. CONSTITUTION WHERE: 1) MEMBERS OF THE CLASS WERE NOT RECOGNIZABLE BY THE REASONABLY COMPETENT EXECUTING OFFICER; 2) NOT EVERY ITEM IN THE CLASS REPRESENTED EVIDENCE, INSTRUMENTALITIES, OR FRUITS OF A CRIME; AND 3) THE CLASS WAS CONCEPTUALLY DEFINED RATHER THAN THE ITEMS SPECIFICALLY DESCRIBED.

The Court of Criminal Appeals found that the "warrant was limited to an identifiable class of material, viz., 'trade secrets', in whatever form they might be found, all of which constitute seizable evidence of a criminal violation." 767 S.W.2d at 453 (App. I, 32). The court likened this case to the "whiskey" case of *Steele v. United States No. 1*, 267 U.S. 498 (1925), holding that the warrant was "sufficiently particular" as "none of the items in the described class is innocent." *Id.* Pursuant to this class description, the executing officer, unable to recognize a "trade secret," seized thousands of files, papers, and effects belonging to VCS, including its own "trade secrets." The "class" definition provided no limitation whatsoever.[4]

---

[4] Pursuant to this "class" limitation, the police conducted a search of Voice Control Partners, an entity not named in the warrant. In addition, even though specifically told by the informant that Mr. Robinson was not in any way implicated, the police and an employee of TI, a competitor of VCS, conducted a search of the private papers and effects of the office of Neal J. Robinson Investments, Inc. Further, even though specifically informed that he was in no way impli-

The court's error is best demonstrated by distinguishing *Steele*. In *Steele*, whiskey could be recognized by the reasonably competent executing police officer; in *Schalk*, "trade secrets" are not recognizable. In *Steele*, all whiskey was contraband; in *Schalk*, not all "trade secrets" are contraband. In *Steele*, whiskey is a physical description; in *Schalk*, "trade secrets is a legal conclusion, at best a statutory definition.

In short, appellant asserts that the Court of Criminal Appeals erred when it found a "class" definition "sufficiently particular" under the Fourth Amendment where: 1) items in the class are not recognizable to the reasonably competent executing officer; 2) not all items in the class are evidence, instrumentalities, or fruits of the crime; and 3) the class is conclusorily defined, not described.

If such class descriptions meet the particularity requirement of the Fourth Amendment to the U.S. Constitution, then no protection is provided citizens' and businesses' reasonable and justifiable expectations of privacy in their papers and effects wherever a class definition of them is available to the police.

---

cated, they conducted a search of the private papers and effects of Mr. Peter J. Foster, an employee of Voice Control Partners. They also conducted searches of the private papers and effects of all other employees of Voice Control Partners, even though none but Dr. Schalk and Dr. Leonard were implicated. The items seized, all at the behest of the TI employee and including the trade secrets and confidential information of Voice Control Partners, were, in the first instance, reviewed by the TI employee, violating the reasonable and justifiable privacy expectations of VCS. They were subsequently reviewed under court order by a consultant acceptable to TI, and outside of the reach or control of VCS, with the assistance of persons paid by TI. The review was conducted using a computer purchased by TI for the Dallas District Attorney's Office. Items allegedly belonging to TI were turned over to TI. Items belonging to VCS were retained and have never been returned. See Transcript, Statement of Facts; Search Warrant Return-Inventory.

III.

THE STATE OF TEXAS MISCONSTRUED THE "GOOD FAITH" EXCEPTION TO THE FOURTH AMENDMENT EXCLUSIONARY RULE TO APPLY WHERE AN EXECUTING OFFICER, ASSISTED OR UNASSISTED, IS UNABLE TO RECOGNIZE THE ITEM TO BE SEIZED, AND THUS IS, OR SHOULD BE, AWARE HE IS CONDUCTING A GENERAL SEARCH.

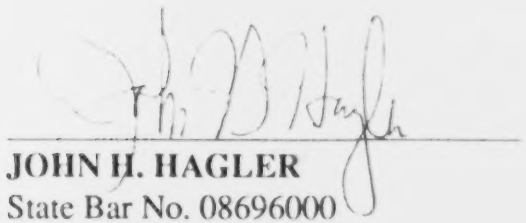
The State of Texas asserts that even if the search was an impermissible general search under the Fourth Amendment, the "good faith" exception to the exclusionary rule of *United States v. Leon*, 468 U.S. 897 (1984) applies. There is, however, an exception to the "good faith" exception. The exclusionary rule will apply where "depending on the circumstances of the particular case, a warrant may be so facially deficient–i.e., in failing to particularize the place to be searched or the things to be seized that the executing officers cannot reasonably presume it to be valid." 468 U.S. at 923. Evidence seized pursuant to such a warrant will not be admitted for the purpose of the prosecution's case in chief.

Appellant maintains that where an officer is subjectively aware that he cannot identify, even with assistance, the items to be seized, and thus conducts a general search, the good faith exception does not apply. Further, appellant maintains that where the item to be seized is objectively unrecognizable by a reasonably competent police officer, assisted or unassisted, the warrant is so facially deficient that the executing officer cannot reasonably presume it to be valid. In either case, the "good faith" exception to the exclusionary rule of *Leon* must not apply. See, *e.g.*, *United States v. Strand*, 761 F.2d 449 (8th Cir. 1985); *United States v. Crozier*, 777 F.2d 1376 (9th Cir. 1985); *United States v. Nader*, 621 F. Supp. 1076 (D.C. Dist. Col. 1985). Otherwise, the particularity requirement of the Fourth Amendment to the U.S. Constitution provides no protection against general searches.

CONCLUSION

It is respectfully submitted that for the reasons outlined above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,



JOHN H. HAGLER
State Bar No. 08696000
3601 NCNB Plaza
901 Main Street
Dallas, Texas 75202
(214) 742-1201

COUNSEL OF RECORD

March 2, 1992

THOMAS BARTON SCHALK, APPELLANT, v. THE STATE OF TEXAS, APPELLEE

No. 05-86-01171-CR

Court of Appeals of Texas, Fifth District, Dallas

767 S.W.2d 441 (Tex. App. 1988)

December 22, 1988

Rehearing denied February 28, 1989.

PRIOR HISTORY: Appeal from a District Court of Dallas County, Texas.

COUNSEL: John H. Hagler, Michael P. Carnes.

Kathi Alyce Drew, Annie B. Wetherholt.

JUDGES: Before Devany, McClung and Thomas, JJ.

OPINION: [*443] OPINION BY JUSTICE McCLUNG

This is an appeal from a jury trial for the theft of trade secrets. Appellant was found guilty and assessed punishment at two years confinement and a fine of $ 5,000, probated for two years.

Specifically, appellant was indicted under Texas Penal Code section 30.01 for knowingly making a copy of five separately identified computer programs that were the trade secrets of his employer.

Appellant contends that: 1) the evidence is insufficient to establish that the five computer programs listed in the indictment were, in fact, trade secrets; 2) the evidence is insufficient to prove that appellant knowingly committed the offense charged; 3) his motion to suppress the product of the search warrant for lack of probable cause should have been sustained; 4) the evidence was the product of an

impermissible general exploratory search; 5) the seizures were not made pursuant to the authority granted under the search warrant, and 6) jury misconduct occurred. Having found no error, we affirm the judgment of the trial court.

FACTS

The complainant, appellant's former employer, is a major corporation with world-wide facilities and engaged primarily in the electronics industry in various capacities. This case involves a computer programming area sometimes referred to as speech synthesis, or voice recognition. It can be described in an oversimplified manner as a computer software program that causes a device to respond in a specified manner to commands issued orally or by voice. The complainant is generally understood to be a pioneer in this field and an industry leader in the research and development of this type of programming for various applications.

The complainant kept and maintained a facility on their premises in Dallas designated as the "speech research laboratory" where this type of programing, research and development was conducted. Appellant had been employed by the complainant for approximately twelve years as an engineer in the speech laboratory. The laboratory was kept physically separated from other facilities within the confines of the overall premises. Access to the laboratory was limited to only certain authorized personnel, estimated to be something less than one hundred out of the several thousand that were admitted daily through the gates of the fences around the perimeter. The exterior gates were monitored by security guards around the clock. Speech laboratory employees were required to wear a certain type identity badge to gain access to the laboratory. Appellant, as an employee in this speech laboratory, was provided with the appropriate identity badge and was one of the limited group of employees granted access to the laboratory.

While so employed, appellant was under the direct supervision and authority of the Branch Manager of the Speech Research Laboratory. This branch manager was also known as the Chief Speech

Scientist. Over the years of appellant's employment, his relationship with the department head became somewhat informal; however, the branch manager was appellant's immediate superior, and appellant always received all [*444] job assignments from the Chief Speech Scientist and was responsible directly to him. Appellant's immediate superior had been associated with the complainant company for many years prior to appellant's employment and, as Chief Speech Scientist, had originally written many of the programs utilized in the research conducted in the speech laboratory. Part of appellant's primary job assignment was to modify or convert certain portions of those original programs so as to accomplish a specific result, such as producing sounds from a speaker rather than a visual output displayed on a video screen, on receipt of an oral command. The final product, while perhaps producing a different result, was primarily made up of the basic original program that had been previously developed and carefully preserved as confidential by the complainant company.

These programs were stored in a memory bank of a computer system in the speech laboratory. Appellant was allowed access to these programs through a code or password specifically assigned to him. The password or code assigned to an employee in the laboratory was personal to that employee and was assigned only if their job duties required access to the information and any of those confidential programs stored in the memory bank. Essentially, access was permitted on a "need to know basis" as it related to their duties. Only by the proper use of his assigned password or code could appellant withdraw information from a memory bank and into a computer terminal. Appellant could also call data from the memory bank into a computer terminal located off of the complainant's premises via telephone modem, with the right kind of computer equipment and the use of his personal password. On certain occasions, persons from outside the company were assigned a guest/user password or code so as to allow access to the computer within the laboratory. This decision and assignment, however, was made by persons within the company other than appellant, and appellant was not consulted or involved in such a decision.

As was customary with all laboratory employees, appellant had a "directory" designated as his and identified as such. Appellant's work product was saved or stored under this directory in the memory bank of the computer in the speech laboratory. Appellant also could, and did, store other data, programs and information in this same directory, some of which was personal to him. The speech laboratory computer equipment had the capability of receiving from, sending to, or copying to another medium, such as magnetic tape, any information stored in the memory when the appropriate instructions or commands were entered. Whenever a computer memory was accessed, the date, time, andidentification of the user and the terminal was automatically logged into the memory. Appellant was experienced and very sophisticated in the use of this equipment and was a top level employee in the laboratory, working at a computer terminal regularly on a full time basis.

Appellant resigned his position with the complainant company to take a position as a vice-president with another company that also engaged in voice recognition and speech synthesis research and development. Although this new company was much smaller in overall size and scope and said to be utilizing a different method or system, the new employer was in fact a direct competitor of the complainant in the area of voice control technology. Appellant's background, knowledge, and experience in this field was a major factor in making the new job available to him.

Over a period of a few years, several other speech laboratory personnel had left the complainant's employment to take positions with this same new employer, primarily because their specialized knowledge in this field gave them unique qualifications that competitive companies would seek out. One such employee had occasion to see some information stored in the memory of the computer he was using on his new job that he believed he recognized and he thought belonged to his former employer, the complainant. Feeling something was amiss, this employee contacted complainant's company security to report what he had seen. (This informant acknowledged [*445] that he felt that he had been wrongfully terminated previously by the complainant and that he hoped that bringing this

information to the complainant's attention would help get his old job back.) A series of meetings between security personnel and the informant took place and during these meetings, additional information was delivered. The informant was also recruited to act as a "mole" to search his employer's premises and equipment for further information or like material. The mole took several photos of various offices and their contents and made copies of some documents he thought belonged to the complainant and contained sensitive material. One of the photographs taken in appellant's office revealed a shelf containing one or more magnetic tapes of the type used to store computer data. Although the contents of the tapes were unknown at that time, at least one of them bore a label with the names of certain programs which the mole recognized from his former employment and job assignments with the complainant.

The information from the informant was passed along through the complainant's corporate structure, and an internal investigation within the speech laboratory took place. From the automatic entries made when the computer memory was accessed, the complainant determined that only a few hours before appellant left complainant's employ, a copy of the entire directory assigned to appellant was made onto a magnetic tape by someone using the personal access code assigned to the appellant. Imbedded within that directory and the information copied onto that tape from that directory were programs identified by the complainant to be trade secrets. Among these were the five programs that were ultimately made the subject of this indictment.

Armed with this information, complainant contacted the District Attorney. A search warrant for the premises of appellant's employer was obtained and executed shortly thereafter. During this search, the tape in question was among the items seized from appellant's office. Examination of the data recorded on the tape using compatible equipment revealed that it did, in fact, contain the five programs listed on the indictment. Appellant was arrested at the time the search warrant was executed at his place of employment.

Appellant does not dispute the fact that he did copy the directory

that had a plethora of data recorded on it, or that the programs on the indictment were included, or that he took the tape with him when he left complainant's employ.

TRADE SECRET

Section 31.05(b)(2) of the Texas Penal Code, entitled "Theft of Trade Secrets," provides:

> A person commits an offense if, without the owner's effective consent, he knowingly makes a copy of an article representing a trade secret.

Section 31.05 defines a trade secret in subsection (a):

> "Trade secret" means the whole or any part of any scientific or technical information, design, process, procedure, formula or improvement that has value and that the owner has taken measures to prevent from becoming available to persons other than those selected by the owner to have access for limited purposes.

To be a "trade secret" within the clear meaning of this section, the information, design, process, procedure, formula or improvement must not only be a secret, but must also be generally unavailable to the public and it must give one who uses it an advantage over competitors that do not know of or use the trade secret. A fair reading of this section suggests that to qualify as a "trade secret", the article in question must meet a three prong test:

1) Be all or part of scientific or technical information,

2) Be of value to the owner,

3) Be protected by measures taken by the owner from access, except; those selected by the owner for limited purposes.

[*446] Appellant does not contest the first two prongs of the test, that is, the fact that the programs are a "part of any scientific or technical information . . . . . that has value. . . ." Rather, he asserts in his first point of error that the evidence is insufficient to support the third prong: He contends that the complainant failed to designate the computer programs as trade secrets or prevent access to the computer where this information was stored; therefore, the complainant did not take measures to prevent access to them. Appellant argues that the programs in question were not trade secrets at the time he made the copy, or, if they had been, they had lost their status as trade secrets because the complainant had not protected them.

Clearly, if an article that is a trade secret becomes known to the community, it loses its status as a trade secret. *Furr's Inc. v. United Specialty Advertising Co.*, 338 S.W.2d 762, 765 (Tex. App.—El Paso 1960, writ ref'd n.r.e.). However, secret's status as such. *Metallurgical Indus. Inc. v. Fourtek, Inc.*, 790 F.2d 1195, 1200 (5th Cir. 1986). There is no question but that appellant was one of the limited persons that had been granted limited access to this information since his job function required him to work with this data on a regular basis. We must determine, therefore, if the data was ever a trade secret and, if so, whether it had lost its status as such for some reason at the time it was copied by appellant.

Appellant points out that several persons had been granted guest/user codes, including a summer intern who was allowed to utilize the laboratory equipment to write his college thesis. That intern testified, however, that he felt the information and codes entrusted to him were a secret and were not to be disclosed. Appellant argues that access could be gained through use of a telephone modem, but recognizes that it took the right kind of computer and user password to do so. Appellant claims that his superior, the Chief Speech Scientist and Branch Manager of the Speech Research Laboratory, had made a ten minute presentation at a seminar where he discussed the "concepts" involved concerning the series of programs listed on the indictment. Although concepts were briefly discussed, the algorithms used in the creations of the programs were not men-

tioned or disclosed. Appellant further maintains that certain data base programs were released to the National Bureau of Standards to aid them in establishing an industry standard. These programs were unrelated to those in the indictment. Appellant further argues that data was released to a university engaged in similar research. This release was only under a nondisclosure agreement. Appellant insists that the internal procedures manual provided to all employees set out the manner that trade secrets were to be identified and handled and these programs were not so identified. Significantly, the basic programs from which the items in question were derived were, in fact, listed in the Trade Secret Register kept by the complainant. While appellant points out certain areas that he feels show complainant's weaknesses in the security of the information, he presents no evidence to suggest that any of the series of programs in the indictment had ever been released to anyone outside the speech laboratory. The complainant vigorously and steadfastly denied that any of these programs and the algorithms had ever been published or given out to anyone and that none of complainant's speech recognition, speech synthesis, speaker verification, or voice verification software had ever been released nor had anyone ever been authorized to do so. Finally, appellant admitted that he had personally told fellow employees that such programs had not been given out.

It is an axiom in our jurisprudence that when interpreting a statute, we should start with the statute itself. A statute must generally be construed according to the fair import of its terms, and with a view to effect its objects and to promote justice. The plain meaning of words used in a statute is not to be disregarded *Casillas v. State*, 733 S.W.2d 158, 163 (Tex. Crim. App. 1986) cert. dismissed at 484 U.S. 918, 108 S. Ct. 277 (1987); *Campos* [*447] *v. State*, 623 S.W.2d 657, 658 (Tex. Crim. App. [Panel Op.] - 1981); *Ramos v. State*, 419 S.W.2d 359, 364 (Tex. Crim. App. 1967). We must assume that the Legislature meant the section to be read as it was written and we cannot create an offense by enlarging on, or inserting or deleting words, nor should we do so by giving false meaning to its words. *State ex rel. Vance v. Hatten*, 600 S.W.2d 828, 830 (Tex. Crim. App. 1980).

Turning to the statute, the pertinent portion reads "that the owner has taken measures to prevent from becoming available to persons other than those selected by the owner. . . ." This statute does not deal with the degree or extent to which an owner must go to protect a secret but simply specifies that for it to be an offense to copy information without the owners' permission, the owner must have taken some measures to protect the information from unauthorized disclosure. Although appellant's attack is directed more toward the type, degree, or extent of the measures taken to protect the data than it is toward the question of whether the ". . . owner has taken measures . . ." we, nevertheless, will treat this point as one of factual insufficiency and address the record under that standard.

The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307 at 319 (1979). This standard is applicable to both direct and circumstantial evidence cases. *Taylor v. State*, 684 S.W.2d 682, 684 (Tex. Crim. App. 1984).

This voluminous record is replete with evidence detailing the strict security measures taken by the complainant to prevent any and all information emanating from the speech laboratory from falling into the hands of unauthorized persons. All employees, including appellant, signed nondisclosure agreements when hired. This was a necessary condition of the employment of the appellant. Various applications of identification badges were provided to all employees and these badges had to be displayed at all times and places while on or about the premises. Different levels of security were applied to different areas and the badges carried features to delineate whether a particular employee was cleared to enter a particular area. The full time security guards, regular employees, receptionist, and so forth, were required to remain alert for anyone they might observe without a proper identification badge for a particular section or area. Visitors were subjected to sign-in procedures and were provided escorts and special identification badges. The entry gates were manned by security guards. Security guards were stationed in selected locations, and closed circuit television monitors were used throughout the building.

Entry to the speech laboratory was limited to only a very small segment of the total employee population, and was contained in a separate wing or building and isolated with security doors from other areas. Within this area, all print-outs or hard copies of any data were kept put away. Night time security checks were made for data left out on desks. In the event any documents were seen by security. personnel during routine off-hour inspections, they were put away and the incident made the subject of a report. Appellant was assigned a password or access code which allowed limited access to some information stored in the computer memory but other data stored in restricted directories was not available. Any access at all required certain code clearance or password information to be given before the computer would respond. A highly confidential Trade Secret Register was kept and maintained as a permanent record in the legal department which contained reference to the "speech processing" programs being utilized in the laboratory. Employees in the laboratory were given an admonition that they were to protect any software programs being used, developed, or being researched by the laboratory. In addition, an "exit" interview was conducted with any employee whose job involved sensitive proprietary and confidentialinformation by a member of the Legal Department [*448] staff for the specific purpose of re-emphasizing their non-disclosure responsibility upon termination.

We conclude that these facts are sufficient for this jury, as a rational trier of fact, to find beyond a reasonable doubt that these elaborate security precautions were taken by the owner/complainant to protect its information, that such information was secret and intended by the owner to remain so. Having determined that the evidence is sufficient to meet the test of "measures taken by the owner to protect", we hold the programs listed in the indictment were trade secrets as defined in Texas Penal Code section 31.05(a) Appellants point of error number one is overruled.

KNOWLEDGE

In his second point or error, appellant maintains that the evidence is insufficient to prove that he "knowingly" made copies of trade

secrets. Appellant having admitted that he made the copy, and our having previously held the items to be trade secrets, we then come to the question of whether appellant "knew" the items were trade secrets when he made the copy, thus that he acted knowingly as set out in Texas Penal Code section 30.01(b)(2). The necessary culpable mental state is described in Texas Penal Code section 6.03(b) thusly:

> A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

TEX. PENAL CODE ANN. (Vernon 1974).

Evidence in regard to a culpable mental state must be viewed in the light most favorable to the verdict. *See Humason v . State*, 728 S.W.2d 363 (Tex. Crim. App. 1987). Absent a confession, proof that appellant acted knowingly must be based on circumstantial evidence. *Dillon v. State*, 574 S.W.2d 92, 94 (Tex. Crim. App. 1978). Being mindful of the above and the standard of review of factual insufficiency claims as set out above, we again turn to the record.

Because appellant had been a full time, high level employee in the speech laboratory for twelve years, he had been subjected to the elaborate security precautions implemented by his employer every day. The controlled physical access to the plant through the use of guards, employee identification badges, visitor escorts and special sign-in procedures, confidential materials kept locked up or destroyed when no longer needed, closed circuit television monitoring, and the necessity of the regular use of secret identity codes on the computer all served as a constant reminder of the restricted environment in which appellant worked. Appellant signed a nondisclosure agreement when he was hired. He discussed the need for secrecy and the nature of the confidential aspects of their work with his immedi-

ate superior and fellow employees on a regular basis during his employment. Periodic staff meetings were held where the nature and progress of their work was discussed and the subject of much of the discussions was the secret and confidential aspects of work appellant and his fellow employees were doing. The value of work and how it did or would affect the complainant's competitive position in the general market place was a significant factor discussed in the regular staff meetings.

Appellant, during his testimony at trial, stated that it would have taken hours to have gone through the numerous programs and data in his directory to selectively pick out items for copying, so in the interest of time, he intentionally entered the commands that would copy all files in the directory, knowing that all files would be copied. He further stated that he had worked on the files that were in his directory and was familiar with them and what they were, but that he did not consider them to be trade secrets; that they were not so marked or designated in the computer and that they were readily accessible to him.

Significantly, appellant not only copied his own entire directory, but also copied [*449] one other directory called the "speech utility" directory. He did so very close to his last day on the job, and used his secret identity code to gain access to all of this data for copying. In his exit interview, which took place as one of the last official events on the job, he signed a document titled Trade Secret Listing for Termination of Employment where he acknowledged that his nondisclosure responsibility and the confidentiality of his work was discussed. Appellant testified he felt he had a right to copy and take anything he was interested in because he never had any intention of using this information. The issue of whether the data and information in question was wrongfully used is not before us. There was also testimony that during the time appellant was in the employ of the new company, he was heard to make reference to items belonging to the complainant as the "stolen data base" and the "stolen files," on a periodic basis.

We hold this evidence is sufficient to support the finding by the

jury that appellant knowingly made copies of protected programs that were of value to his employer. Appellant's second point of error is overruled.

SEARCH AND SEIZURE

Appellant next maintains that his pretrial motion to suppress the evidence obtained through the search warrant should have been sustained because the magistrate did not have a sufficient showing of probable cause to issue the warrant. In support of his argument, appellant claims violation of the Federal Constitution, State Constitution, and state laws. We will address the constitutional and statutory consideration independently.

Both the fourth amendment to the Federal Constitution and the Texas Constitution guarantee that "the people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation." TEX. CONST. art. I, § 9. In interpreting the fourth amendment, the Supreme Court has held that an affidavit is sufficient in establishing probable cause if, from the totality of the circumstances reflected in the affidavit, a reviewing court can determine that the magistrate was provided with a substantial basis for concluding that probable cause existed. *Illinois v. Gates*, 462 U.S. 213 at 238-39 (1983). In *Gates*, the Supreme Court criticized the application of the "two-pronged" test to determine whether probable cause exists that had evolved from *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969), stating that although the veracity and basis of knowledge of an informant are highly relevant factors in determining the value of an informant's report:

> "These elements should not be understood as entirely separate and independent requirements to be rigidly exact in every case. (103 S. Ct. at 2328). [462 S. Ct. at 230]

* * *

> . . . The Task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of the reviewing court is simply to insure that the magistrate had a'substantial basis for conclud[ing]' that probable cause existed. . . . (103 S.Ct. at 2332). [462 U.S. at 238]

Hennessy v. State, 660 S.W.2d 87, 89 (Tex. Crim. App. 1983).

The question then arises as to whether the Texas Constitution establishes a higher threshold of probable cause standard for the issuance of a search warrant than that required by the fourth amendment. We hold that it does not. The language of article 1, section 9 of the Texas [*450] Constitution is substantially the same as that used in the fourth amendment of the United States Constitution. Accordingly, the same rationale underlying the opinions construing the Federal Constitution applies with equal force to the Texas Constitution. Because of the identical language, article 1, section 9 cannot be independently read to establish a greater probable cause standard than that provided by Illinois v. Gates.

In *Brown v. State*, 657 S.W.2d 797, 799 (Tex. Crim. App. 1983), Judge McCormick, writing for a plurality, observed that the Court of Criminal Appeals "has opted to interpret [the state] constitution in harmony with the Supreme Court's opinions interpreting the Fourth Amendment. A majority of that court adopted the view of the Brown plurality and held valid the search of an automobile passenger compartment in reliance upon the decisions of the Supreme Court interpreting the fourth amendment in *Osban v. State*, 726 S.W.2d 107 (Tex. Crim. App. 1986). Further, the Court of

Criminal Appeals has applied the "totality of the circumstances" analysis in determining the validity of a search warrant for probable cause under the Texas Constitution, and the appellate courts have followed the direction of the Court in the application. *See Hennessy v. State*, 660 S.W.2d 87 (Tex. Crim. App. 1983); *Correll v. State*, 696 S.W.2d 297 (Tex. App.—Fort Worth 1985, pet. ref'd); *Andrada v. State*, 695 S.W.2d 230 (Tex. App.—Corpus Christi 1985, no pet.).

TEX.CODE CRIM.PROC.ANN art. 18.01(b), (c) (Vernon Supp.1986) states:

> (b) No search warrant shall issue for any purpose in this state unless sufficient facts are first presented to satisfy the issuing magistrate that probable cause does in fact exist for its issuance. A sworn affidavit setting forth substantial facts establishing probable cause shall be filed in every instance in which a search warrant is requested.
>
> (c) A search warrant may not be issued . . . unless the sworn affidavit required by Subsection (b) of the article sets forth sufficient facts to establish probable cause: (1) that a specific offense has been committed, (2) that the specifically described property or items that are to be searched for or seized constitute evidence of that offense or that a particular person committed that offense, and (3) that the property or items constituting evidence to be searched for or seized are located at or on the particular person, place or thing.

Of particular relevance is *Elliot v. State*, 687 S.W.2d 359 (Tex. Crim. App. 1985), upholding the Houston Court of Appeals in applying the totality of circumstances analysis under both the Texas Constitution and the Texas Code of Criminal Procedure article 18.01.

Accordingly, such application of the "totality of the circum-

stances" standard of review to review an affidavit under the Texas Constitution and article 18.01 of the Texas Code of Criminal Procedure is correct. We will determine the validity of this search warrant in the instant case under the "totality of the circumstances" analysis, recognizing there is no magic formula for stating the necessary information, and understanding that we must interpret the affidavits in the same common-sense, realistic manner as the magistrate, drawing reasonable inferences from the facts contained therein.

Applying the law to the facts before us, the affidavit for the search warrant is based on what five informants told the affiant, a special investigator with the specialized crime division of the District Attorney's office, and not on the affiant's personal knowledge. Two of the informants were security personnel of the complainant, being Vice-President of Safety and Security and the Regional Security Manager, respectively. Two others were the Branch Manager of the Speech Research Laboratory, appellant's immediate superior, and the Branch Manager of the Central Research Laboratory Computer Facility. The fifth informant was the employee (mole) of the other company that made the original report.

The affidavit sets out in detail that the affiant first talked to informants A and B, the security personnel, and was advised by [*451] these informants that they had been contacted by informant C, a former employee, and learned from informant C that within the two weeks previous, certain officers and employees of his current employer had possession of computer software, proprietary information and data relating to research in the field of speech recognition; that informant C had personally seen magnetic tapes, bound manuals and documents bearing the complainant company's name and marked "classified", "strictly private", "Property of TI ONLY", and "Speech Recognition TaskForce, Final Report, July 1981" which was marked "Strictly Private". They further advised affiant that informant C had, on his own initiative, removed a number of documents he had seen and given them to informants A and B, and that these documents had been identified as belonging to complainant; that informant C had made print-out copies of various computer directories and computer files from the computer at his place of

employment which had been delivered to them and these documents had been identified as containing confidential data belonging to complainant; informants A and B also told him that the duties of appellant, at the time of his leaving the complainant's employment, included research in the field of speech recognition under the supervision of informant D, and that appellant had signed a "Trade Secret Listing for Termination of Employment" in which appellant acknowledged being advised concerning disclosing proprietary information or trade secrets.

Affiant was told by informant C, who was at that time employed in the same company as appellant, that certain officers and employees, including appellant, had possession of computer software, proprietary information and data relating to the field of speech recognition; that these officers and employees had recently made reference to the "(complainant's) files" in informant C's presence and that appellant was currently engaged in converting complainant's software to (competitor's) software; that informant C had personally observed and photographed six magnetic tapes of a certain brand and bearing labels that suggested to informant C they were the property of the complainant; further, that he had personally observed and photographed certain manuals in appellant's office bearing complainant's logo; that informant C had delivered to the affiant prints of the photographs and the documents, and examination by the affiant showed those items to be as observed by this informant; further, informant C made a print-out (hard-copy) of three computer files stored in the computer, also delivered to and viewed by the affiant, one of which contained the language "Modified 4-19-85 by (appellant) to handle both (new company) files and (complainant) files. Additionally, informant C made and delivered to affiant a printed copy of the "directory" of all programs carried on his employer's computer under appellant's name which showed a creation date prior to appellant leaving complainant's employment; the programs listed on this directory were identified by informant D as being either extremely similar to, or identical to, in many cases, complainant's directory listings and the creation dates on the vast majority of programs were identical to the creation dates of complainant's programs and predated appellant's termination with complainant; all of which

affiant personally examined and determined they did contain the information as represented.

Informants D and E told the affiant that their personal examination of the documents, print-outs, and data provided by informant C revealed that they were the property of the complainant and that it was proprietary and contained trade secrets which had been developed from years of research at very substantial expense and, if released, would cause extensive loss and harm to the complainant's future market share; and further, that appellant had been made fully aware and acknowledged to them in writing that any release or revelation of this information to anyone outside complainant's company was strictly forbidden because it was considered a trade secret. Informants D and E also confirmed the credibility of informant C, verifying his ability to recognize such trade secret data [*452] from his experience in the field of speech recognition and prior employment with complainant.

Interpreting this affidavit in a common-sense, realistic manner and drawing reasonable inferences from the facts contained therein, we hold that this search warrant was based on probable cause. Appellant's point of error three is overruled.

We now turn to whether the search warrant described the things to be seized with particularity, as required by section 9 of article 1 of the Texas Constitution, or whether it was overly broad. Appellant argues that his motion to suppress the seized evidence should have been sustained because it was the product of a general exploratory search. We disagree. The requirements for a sufficiently particular description can vary according to the thing being described. *Walthall v. State*, 594 S.W.2d 74, 78 (Tex. Crim. App. 1980). Appellant relies heavily on *United States v. Klein*, 565 F.2d 183 (1st Cir. 1977), where the warrant was held to be in violation of the Fourth amendment of the United States Constitution because the affidavit provided the magistrate with only a generic description of "pirated" reproductions of copyrighted recordings on electronic 8-track tapes, and failed to provide a method whereby the officer could differentiate between contraband and legitimate inventory in the defendant's

store.

The *Klein* holding is different from the present case in two important respects. First, the *Klein* warrant did not reveal with any degree of certainty that legitimate or authorized tapes would not be seized. Second, in *Klein* there was no specific and detailed foundation for a belief that a large collection of similar contraband was present on the premises which would serve to reduce the level of particularity required. In the case before us, the affidavit specifically described the items considered to be contraband by the labels on magnetic tapes, identifying titles on documents and manuals, supported by photographs of their exact location and identity and the personal observation by the informant. The search warrant itself states that the officers were to search for:

> magnetic tapes containing active data, and the corresponding archive tapes and backup tapes; removable disks containing active data, and the corresponding archive tapes and/or disks and backup tapes and/or disks; and fixed disks containing active data, and the corresponding archive tapes and/or disks and backup tapes and/or disks; and specifically including five (5) magnetic tapes bearing the brand name "quadronix 1", and respectively being labeled "SPDIR.BCK", "SPRGL.BCK", "SPGD.BCK", "DRAFT.BCK", and "Label: ADDR Copy used"; and
>
> all documents and other written materials containing, in whole or in part, "trade secret" information and/or data and/or files notebooks, pamphlets, instructions, summaries, manuals, correspondence, memorandums, papers, file listings, file directories, and file dumps, including all such documents marked " TI Strictly Private" or "TI Classified;"

The fourth amendment and the Texas Constitution and statutes do not require a minute and detailed description of the property to be seized, but the property must be so definitely described that the

officer making the search will not seize the wrong property. The description should be sufficient to direct the officer which articles to select for seizure the described from the generally inoffensive, and not confer free-wheeling discretion upon the officer.

We have a fact situation where the officer is directed to search for a unique set of articles, that by their very nature can only be known to or recognized by a very select and limited group of persons. The matter is further complicated by the fact that the "trade secrets" made subject of the search warrant could, and in this case did, take several forms: written documents, computer print-outs (hard-copy), magnetic tape recording, or any other type of digital storage media. The specifically labeled magnetic tapes and the printed documents and manuals bearing clearly visible identifying [*453] ownership labels which contained "trade secrets" were set out in the affidavit and warrant. To describe the "trade secret" itself in sufficient detail to meet the argument of appellant would be to reveal the precise secret information that was intended not to be revealed.

The officer had plain directions on what to seize, and was authorized to take only those articles containing "trade secret" information or data. Significantly, the warrant provided that the necessary access codes and passwords be provided so that a search of the computer storage could be examined for digitally stored "trade secret" programs as an alternative to the physical seizure of the "fixed disk drives" or "removable packs" of the computers on the premises covered by the warrant. Also, the warrant made provision for a representative of appellant's employer to be present during the copying of any information obtained through the use of such access codes or passwords. This warrant was limited to an identifiable class of material, viz., "trade secrets", in whatever form they might be found, all of which constitute seizable evidence of a criminal violation. The officer would seize anything else at his peril. Like the "whiskey" mentioned in *Steele v. United States No. 1*, 267 U.S. 498 (1925), from prohibition days, none of the items in the described class is innocent. We hold this warrant sufficiently particular in its description of the items to be seized and was correctly executed. Point of

error four is overruled.

In his point of error five appellant expands on his previous complaint of a general exploratory search previously addressed and says that the seizures were not made pursuant to the authority granted under the search warrant. As we understand appellant's argument, he maintains that the warrant was directed to a peace officer commanding him to search but that he did not do so, but instead, allowed a representative of the complainant to select what he was to seize, and that the officer took items based on the discretion of this representative rather than the language of the warrant. Appellant relies on *Maryland v. Garrison*, 480 U.S. 79, 107 S.Ct. 1013 (1987) for the proposition that theofficer is required to conduct a search pursuant to the mandates of the warrant so as to insure that the search will be carefully tailored to its justifications, and will not take on the character of an exploratory search. This is the often repeated language of *Marron v. United States*, 275 U.S. 192 (1927), that warrants shall particularly describe the things to be seized and prevents the seizure of things not described and should leave nothing to thediscretion of the officer. This standard originally derived from Colonial America and its aversion to writs of assistance and general warrants which placed broad discretionary authority with British custom officials to search anywhere for smuggled goods and seize anything they pleased.

We are unable to perceive that appellant can draw support or comfort from this line of cases for his position that the officer acted improperly by the utilization of someone to aid him in the execution of this warrant. First, article 18.08, Texas Code of Criminal Procedure, specially authorizes the officer to do so. A literal reading of this article would suggest that any citizen called upon to aid an officer is bound to aid the officer and has little or no choice to do otherwise. Second, this article gives the option to call for aid to the officer and it is not necessary that the officer get his authority to request aid from the warrant and third, this warrant does not have the indices of a general warrant. It is limited to a search of a particular place and for particular items, viz., trade secrets.

The nature of these items, as heretofore mentioned, make it virtually impossible to set out a clear standard that the executing officer could use to differentiate a trade secret from a legitimate program; however, we hold the warrant with the affidavit attached provided substantially more than a generic description of the matters to be seized and gave the officer sufficient description that once the items were identified by someone knowledgeable and could recognize the trade secret, in whatever form it took, the officer could then determine whether it was seizable under the [*454] warrant. On balance, considering the unique nature of the items being sought, use of assistance under article 18.08 by the officer would tend to limit or restrict the items seized rather that enlarge upon them. Point of error five is overruled.

JURY MISCONDUCT

Finally, appellant asserts the court erred in overruling his motion for new trial. Appellant claims there was jury misconduct during deliberation in the initial guilt/innocent phase of the trial. In his original and supplemental motions for new trial, appellant presented affidavits of two jurors stating they had agreed to change their vote to guilty only after the other jurors agreed that appellant would be granted probation and not be sent to prison. During the hearing on the motion for new trial, three other jurors controverted this assertion in their testimony and insisted no such agreement was made among the jurors. The test for jury misconduct asks first whether there was misconduct, and second, did it result in harm. Reviewing courts have often concluded that charges of jury misconduct predicated upon jury consideration of punishment during deliberation on guilt/innocent are improper efforts to "impeach" the verdict by going into the thought processes of the jurors. Nevertheless, the basic principle remains that jurors should confine their deliberations to the evidence adduced at trial, lest a fair and impartial verdict according to law be improperly influenced by irrelevant and prejudicial matters not relating to either the guilt or innocence or punishment. Accordingly, the resolution of this point of error hinges upon whether appellant was improperly impeaching the jury's verdict or was, on the other hand, properly demonstrating jury misconduct.

Even when it is concluded that efforts to show juror discussion or consideration of punishment was impermissible impeachment of the jury verdict, the courts distinguish those cases in which the members of the jury make an agreement to render a guilty verdict in exchange for a lighter punishment. In *Daniels v. State*, 600 S.W.2d 813, 816 (Tex. Crim. App. 1980), the court observed that although leniency was discussed, "all four jurors stated there had been no agreements of any sort between them." *See Adams v. State*, 481 S.W.2d 884 (Tex. Crim. App. 1972) (where three jurors announced they would vote with majority,"[a]bsent a showing that they agreed to be bound thereby, there is no error."). In contrast, appellant relies on *Vorwerk v. State*, 735 S.W.2d 672 (Tex. App.—Austin 1987, no pet.) and *Escarcega v. State*, 711 S.W.2d 400 (Tex. App.—El Paso 1986, pet. granted), with strikingly similar facts, and each court concluded the jury's conduct was in disobedience to the instruction to "restrict your deliberations solely to the issue of guilt or innocence of the defendant." Those courts held further that the jury had engaged in misconduct harmful to the defendant and since "the State failed to introduce any controverting evidence . . . no issue of fact existed for the trial court to determine. In such case, a new trial should be granted."

The evidence adduced at this motion for new trial from two jurors was offered to establish that these two jurors voted to find the defendant guilty on the basis of an "understanding" that the defendant would not be sent to prison but would be granted probation. Appellant did not establish that any "agreement" had been made and the State put on controverting testimony from other jurors that no such understanding or agreement was reached to arrive at their verdict of guilty. This conflict in testimony raised an issue of fact as to misconduct for determination by the trial judge. Where the conflicting evidence raises such a fact issue, and the trial court overrules the motion for new trial, there is no abuse of discretion. *Sneed v. State*, 670 S.W.2d 262, 266 (Tex. Crim. App. 1984); *McCartney v. State*, 542 S.W.2d 156, 162 (Tex. Crim. App. 1976). We hold, therefore, that appellant has failed to carry his burden in showing he was denied a fair and impartial trial because of jury misconduct. Point of error six is overruled.

AFFIRMED.

THOMAS BARTON SCHALK
and
ROBERT GARY LEONARD,
Appellants

Nos. 665-89, 666-89 v.

STATE OF TEXAS

Petition for Discretionary Review from the Fifth Court of Appeals

(DALLAS) County

APPELLANTS' PETITION FOR DISCRETIONARY REVIEW

Appellants were convicted of theft of trade secrets. V.T.C.A. Penal Code § 31.05. They pled not guilty to the indictments[1] and were afforded a joint trial on the merits. A jury found both appellants guilty of the offenses as charged and assessed punishment at two years confinement in the Texas Department of Corrections[2] and a $5,000 fine for each. Appellants raised six points of error in the court of appeals, alleging the evidence was insufficient to establish trade secret status and mental culpability for the act of theft thereof, additional points concerning the authorization of the search, and an allegation of jury misconduct. The court of appeals affirmed appellants' convictions in separate published opinions. *Schalk v. State*, 767 S.W.2d 441 (Tex.App.—Dallas 1988); *Leonard v. State*, 767 S.W.2d 171 (Tex.App.—Dallas 1988). Appellants petitioned this Court on six grounds for review, two of which we granted, to-wit: 1)

---

[1]Schalk and Leonard were charged in separate indictments in cause nos. F-85-98689-M and F-85-9860-MHM, each charge for the offense of theft of trade secrets. Because of the close relationship between the two causes, appellants were tried jointly.

[2]Now the Texas Department of Criminal Justice, Institutional Division.

"The court of appeals erred in holding that the evidence is sufficient to show that the so-called computer programs that were alleged in the indictment were trade secrets"; and 2) "The court of appeals erred in holding that the search warrant sufficiently described the magnetic tapes that were seized and that the magnetic tapes were not seized pursuant to a general exploratory search."[3] We will affirm the court of appeals.

[Schalk and Leonard — 2]

A brief recitation of the facts is necessary to set the background for the alleged commission of the instant offense. Appellants Schalk and Leonard are former employees of Texas Instruments (hereafter TI). Both men have doctoral degrees and specialized in the area of speech research at TI. Schalk resigned his position with TI in April 1983 to join a newly developed company, Voice Control Systems (hereafter VCS). In February 1985, Leonard resigned from TI and joined VCS. Several TI employees eventually joined the ranks of VCS. Speech research was the main thrust of the research and development performed by VCS. In fact, VCS was a competitor of TI in this field.

In April 1985 Sam Kuzbary, then employed with VCS and a former TI employee, noticed some information which he believed to be proprietary to TI stored in the memory of the computer he was using at VCS. Kuzbary contacted TI and agreed to serve as an "informant" for them. He then searched the premises of VCS and photographed materials which he recognized from his employment with TI. A TI internal investigation revealed that a few hours prior to Schalk's and Leonard's departures from TI, each appellant, utilizing TI computers, copied the entire contents of the directories respectively assigned to them. This information included computer

---

[3]The remaining grounds allege that the evidence was insufficient to prove that both appellants "knowingly" committed the offense, error resulting from jury misconduct, and unconstitutionality of Texas Penal Code § 35.01.

programs which TI claimed to be its trade secrets.

Officials of TI then contacted the Dallas District Attorney's Office. A search of the premises of VCS resulted in the seizure of computer tapes containing the alleged TI trade secret programs from appellants' offices. Appellants were arrested and the following indictments were returned:

THOMAS BARTON SCHALK, hereinafter styled Defendant, on or about the 27th day of April in the year of our Lord One Thousand Nine Hundred and Eighty-Three in the County and State aforesaid, did unlawfully, then and there, knowingly make a copy of an article representing trade secrets of Texas Instruments Incorporated, a corporation, to-wit: a computer disk on which the following computer programs were stored:

LPCSPEAK1.FOR created May 3, 1981 at 1:30 p.m.
LPCSPEAK2.FOR created January 10, 1982 at 5:04 p.m.

[Schalk and Leonard — 3]

LPCSPEAK3.FOR created October 18, 1982 at 6:51 a.m.
LPCSPEAK4.FOR created October 27, 1982 at 1:56 p.m.
RTSSPEAK3.FOR created October 18, 1982 at 6:52 a.m.

and said Defendant copied said computer programs, which were the trade secrets of Texas Instruments Incorporated, from said computer disk onto a magnetic tape without the effective consent of Texas Instruments Incorporated, the owner of said trade secrets...

ROBERT GARY LEONARD, hereinafter styled Defendant, on or about the 18th day of February in the year of our Lord One Thousand Nine Hundred and Eighty-Five in the County and State aforesaid, did unlawfully, then and there, knowingly make a copy of an article representing trade secrets of Texas Instruments Incorporated, a corporation, to-wit: a computer disk on which the following computer programs were stored:

V2REC 9.FOR created July 28, 1982 at 1:40 a.m.

V2REC 9LN.FOR created October 7, 1982 at 1:08 a.m.
V3REC 9.FOR created November 16, 1982 at 3:53 a.m.
V3REC 9.FOR created October 8, 1982 at 8:33 a.m.
V4REC 9.FOR created January 13, 1983 at 2:32 p.m.

and said Defendant copied said computer programs, which were the trade secrets of Texas Instruments Incorporated, from said computer disk onto a magnetic tape without the effective consent of Texas Instruments Incorporated, the owner of said trade secrets...

To reiterate, we granted review to consider, first, whether the evidence was sufficient to establish that the computer programs named in the indictments were trade secrets, and second, to determine whether the items listed in the search warrant were sufficiently described so as to preclude a general exploratory search. We will first address the trade secrets issue and then examine the search warrant to determine the specificity of its scope.

Trade Secrets

We begin our discussion with the nature of the alleged trade secrets in the instant case, viz computer programs. Texas trade secret law has its origins in the civil law arena. *See BPI*

[Schalk and Leonard — 4]

Systems, Inc. v. Leith, 532 F.Supp. 208 (W.D. Tex. 1981) (Fifth Circuit case applying Texas law utilizing the trade secrets definition from the Restatement of Torts, *citing Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1958)).[4] In *BPI*, the subject of the trade secret

---

4The definition in the Restatement of Torts, § 757, as approved in Huffines, 314 S.W.2d at 776 reads in pertinent part:

b. Definition of trade secret. A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers....

litigation was a computer software program, which the court found met the trade secrets definition under Texas civil law.

Prior to the enactment of § 31.05, theft of trade secrets was subject to criminal charges under theft of property statutes. *See Hancock v. State*, 402 S.W.2d 906, 908 (Tex.Cr.App. 1966) (cites to theft statutes defining "property"). This Court's decision in *Hancock*, while not dispositive of the instant situation, does recognize computer programs as "property" subject to criminal jurisdiction.

Few cases have been decided under Penal Code § 31.05. *See Falcone v. State*, 682 S.W.2d 418 (Tex.App.—Houston [1st] 1984, no pet.) (in discussion of whether theft of trade secret computer programs was properly charged under the general theft statute, the court determined that the charge should have been made pursuant to the more specific theft of trade secrets statute). *See also Atkins v. State*, 667 S.W.2d 540 (Tex.App.—Dallas 1983, no pet.) (indictment for theft of trade secrets reading "architectural plans designed and drawn by Billy Joe Noles" held fatally defective because it did not effectively identify the property in question).

Having determined that computer programs are proper subjects for trade secret litigation under Texas civil and criminal law, we now look to the case sub judice to determine whether the programs which appellants copied and took with them to

[Schalk and Leonard — 5]

VCS are trade secrets as defined by § 31.05 of the Penal Code, to-wit:

§ 31.05 Theft of Trade Secrets

(a) For purposes of this section:

(1) "Article" means any object, material, device, or substance or any copy thereof, including a writing, recording, drawing, sample, specimen, prototype, model, photograph, microorganism, blueprint, or map.

(2) "Copy" means a facsimile, replica, photograph, or other reproduction of an article or a note, drawing, or sketch made of or

from an article.

(3) "Representing" means describing, depicting, containing, constituting, reflecting, or recording.

(4) "Trade secret" means the whole or any part of any scientific or technical information, design, process, procedure, formula, or improvement that has value and that the owner has taken measures to prevent from becoming available to persons other than those selected by the owner to have access for limited purposes.

(b) A person commits an offense if, without the owner's effective consent, he knowingly:

(1) steals a trade secret;
(2) makes a copy of an article representing a trade secret; or
(3) communicates or transmits a trade secret.

(c) An offense under this section is a felony of the third degree. (emphasis supplied)

Appellants claimed on appeal that the programs did not meet the statutory trade secrets criteria because they alleged their former employer TI failed to take "measures to prevent [the information] from becoming available to persons other than those selected by the owner." V.T.C.A. Penal Code, § 31.05(a) (4). We note, as did the court of appeals, that the statute sets no standards for degree or sufficiency of the "measures" taken. *See Schalk*, 767 S.W.2d at 447; *Leonard*, 767 S.W.2d at 176.

Specifically, appellants pointed to considerable disclosure of speech research information, citing the "academic environment" of the laboratory in which they worked as encouraging the sharing of information, rather than maintaining secrecy. Appellants also claimed that TI policy favored protection of its research and development efforts through the patent process, as opposed to

[Schalk and Leonard — 6]

trade secret designation. Further, appellants allege that the programs that are the subject of the instant case were not listed in the TI register of trade secrets and that TI was lax in implementing its standard procedures with regard to notifying employees of trade secrets within the company. The precise issue before us in the case sub judice is one of first impression in Texas, to-wit: what constitutes requisite "measures" to protect trade secret status? Appellants emphasize the degree or extent to which "measures" were taken, rather than whether "measures" were taken. We agree with the court of appeals that the issue in this case presents a question of factual insufficiency. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find the essential elements of the offense beyond a reasonable doubt). *Schalk*, 767 S.W.2d at 447; *Leonard*, 767 S.W.2d at 176.

We will analyze the court of appeals opinion in view of the "measures" which the court found sufficient to meet the definition of trade secrets under section 31.05 of the Texas Penal Code. The court of appeals listing included the following measures:

Non-disclosure Agreements

1) non-disclosure agreements signed by all new employees when hired;

2) exit interviews with terminating employees to emphasize non-disclosure of confidential information;

Plant Security

3) identification badges to prevent unauthorized personnel from entering certain areas;

4) use of security guards and closed-circuit television monitors;

5) entry to speech lab limited to small number of total TI personnel; speech lab physically located in separate wing or building;

6) print-outs and hard copies of data were to be kept out of sight and nighttime security checks were conducted for data left out on desks; data found during such checks was subject to security report;

7) issuance of computer passwords or access codes so that data stored in restricted directories was not available to unauthorized personnel; all access required certain code clearance or password information before the computer would respond;

Other Measures

8) TI Trade Secret Register referred to "speech processing";

[Schalk and Leonard — 7]

9) general reference to admonitions to lab personnel to protect software developed in the lab.

A literal reading of 31.05(a) (4) indicates that the above corporate actions and policies would qualify as "measures" under the statute, i.e., such that "the owner has taken measures to prevent from becoming available to persons other than those selected by the owner to have access for limited purposes." The statutory definition, without elaboration as to degree or type of measures, indicates that "some measures" would be sufficient, and we agree that the above listing does constitute "some measures" as the court of appeals determined. *Schalk*, 767 S.W.2d at 447; *Leonard*, 767 S.W.2d at 176. We believe, however, that elaboration of the term "measures," beyond the scope of the court of appeals discussion, is necessary from the standpoint of the remainder of the definition, to-wit: "to prevent from becoming available to persons other than those selected by the owner to have access for limited purposes."

Appellants' claims on appeal to the court of appeals and to this Court focus on the encouraged disclosure of speech research information to non-TI personnel engaged in similar research activities. We therefore next direct our attention to the disclosure issue to determine whether appellants' first ground for review has merit. Appellants argue, somewhat convincingly, that TI encouraged the sharing of speech research to others in the same field, thereby demonstrating to the speech research community that TI was on the

leading edge of such research and fostered the free flow of information on the subject. In support of their position, appellants point to numerous published articles and papers in which their research was discussed, meetings during which TI speech laboratory activities were shared, and the giving of certain information and materials to schools and government agencies involved in similar research projects.

Returning to the list of "measures" adopted by TI and scrutinizing then in light of the appellants' allegations of extensive disclosure, it becomes apparent that because we have

[Schalk and Leonard — 8]

limited precedent to guide us in this analysis, we must look to other jurisdictions for assistance. To facilitate the interpretation of these issues, we will group certain of the "measures" which have similar characteristics.

Non-Disclosure Agreements

Appellants Schalk and Leonard each signed three separate types of non-disclosure agreements with TI. First, upon beginning employment with TI, each signed an "Employee Trade Secret Information Acknowledgement" agreement, which reads in pertinent part as follows:

I, [Thomas Barton Schalk] [Robert Gary Leonard], upon my employment by Texas Instruments, Incorporated, have been advised:

A. Of procedure SP 7-4-4, entitled "Safeguarding TI in Trade Secret Matters";

* * *

E. That I am not to use for my own benefit or for the benefit of others, or disclose to other TIer's except on a "need to know" basis, with a statement that the information is TI proprietary or trade secret, or disclose to any person outside of TI, any TI proprietary or trade

secret information or customer proprietary information received under appropriate written contract to which I have access.

* * *[5]

Procedure SP 7-4-4 states TI policy for protecting trade secrets belonging to TI. Trade secret information is defined by TI, to-wit:

Proprietary information owned by TI which is or may be used in the TI business and which provides TI an advantage over competitors who do not know or use it. Trade secret information is sensitive information, important to TI, the unauthorized use or disclosure of which could seriously harm the business interests of TI....

The definition further specifies that "software" is included in the types of technological information that may comprise a TI trade secret.

[Schalk and Leonard — 9]

Second, appellants signed an "Assignment of Inventions and Company Information Agreement" form, which reads in pertinent part:

In consideration of my employment by Texas Instruments Incorporated or any subsidiary thereof (hereinafter, collectively referred to as "TI"), I hereby agree as follows:

I.
ASSIGNMENT OF INVENTIONS

A. I agree to disclose promptly, completely and in writing to TI and I hereby assign and agree to assign and bind my heirs, executors, or administrators to assign to TI or its designee, its assigns, succes-

---

[5]Paragraphs B., C., D., and F. refer to procedures for handling proprietary or trade secret information received from outside TI.

sors or legal representatives, any and all inventions, processes, diagrams, methods, apparatus, or any improvements (all hereinafter collectively called "inventions") whatsoever, discovered, conceived, and/or developed, either individually or jointly with others, during the course of my employment with TI (including any and all inventions based wholly or in part upon ideas conceived during my employment with TI), or using TI's time, data, facilities and/or materials, provided the subject matter is one within a field of interest of TI. My obligations under this paragraph apply without regard to whether an idea for an invention or a solution to a problem occurs to me on the job, at home, or elsewhere. I further agree that all such inventions are TI's exclusive property, whether or not patent applications are filed thereon.[6]

B. Subject matter within a field of interest of TI includes any field of interest that has been worked on by TI in the past, in which there is work in progress at the date of or during my employment with TI, and projects or other operations at TI planned for the future....

* * *

III.
COMPANY INFORMATION

A. I recognize that my position with TI is one of highest trust and confidence by reason of my access to and contact with the trade

---

[6]Appellants argue that TI relied on the patent process for protection of its speech research software, rather than trade secret status. We note, without further comment, that reliance on the "patent process" will not protect trade secrets prior to the issuance of the patent because the information remains a secret until the patent is issued. Upon issuance of a patent, the subject information becomes part of the public domain and is no longer protected by trade secret law. *Luccous v. Kinley Co.*, 376 S.W.2d 336 (Tex. 1964).

secrets and confidential and proprietary business information of TI. I shall use my best efforts and exercise utmost diligence to protect and safeguard the trade secrets and confidential or proprietary information of TI.

[Schalk and Leonard — 10]

B. Except as may be required by TI in connection with and during my employment with TI or with the express written permission of TI, I shall not, either during my employment with TI or thereafter, directly or indirectly, use for my own benefit or for the benefit of another, or disclose to another, any trade secret or confidential or proprietary information (whether or not acquired, learned, obtained or developed by myself alone or in conjunction with others) of TI, its customers, contractors or of others with which TI has a business relationship.

C. I further agree that all memoranda, notes, records, drawings, or other documents made or compiled by me or made available to me while employed by TI concerning any process, apparatus or products manufactured, used, developed, investigated or considered by TI or concerning any other TI activity shall be the property of TI and shall be delivered to TI upon termination of my employment or at any other time upon request.

* * *

Last, each appellant participated in an exit interview conducted by the legal department prior to or at the time of termination of employment. An integral part of the exit interview is the signing of another non-disclosure form entitled "Trade Secret Listing for Termination of Employment." In this agreement, appellants acknowledged that they had ben advise of their obligations to the company concerning trade secrets and proprietary information to which they had access during their employment with TI. The agreement further states, "I have been advised that I cannot disclose to others, or use for my own benefit or the benefit of others, any proprietary information and trade secrets to which I have had access at TI....I am

free to use information in the public domain and my own skill, knowledge, know how, and experience to whatever extent and in whatever way I wish so long as such use does not involve such trade secrets or proprietary information."

Employment contracts containing non-disclosure agreements are common in trade secret law. *See Aries Information Systems, Inc. v. Pacific Management Systems Corp.*, 366 N.W.2d 366 (Minn.App. 1985) (in suit for misappropriation of trade secret, employees signed an "Employee Confidential Information Agreement" which the court considered as a reasonable effort to maintain the secrecy of

[Schalk and Leonard — 11]

computer software). In fact, courts have found the implied duty of confidentiality by virtue of the employer/employee relationship, even in the absence of a written agreement. *See Welex Jet Services, Inc. v. Owen*, 325 S.W.2d 856 (Tex.Civ.App.—Fort Worth 1959, writ ref'd, n.r.e.). Although a confidentiality agreement existed in Welex, the court stated that "[C]onfidential information secured by reason of fiduciary relationships may not be used or disclosed to appellant's detriment irrespective of an agreement not to do so." Id. at 858. *Cf. Hyde Corp. v. Huffines*, 158 Tex. 566, 314 S.W.2d 763, cert. denied, 358 U.S. 898 (1958) (fiduciary relationship of confidentiality existed between licensor/licensee in absence of written contract). Appellants unquestionably contracted with TI, giving rise to a fiduciary duty not to disclose TI trade secrets or TI proprietary information to anyone not so designated by the company.

We now determine whether the information disclosed with TI's permission or encouragement, such as published articles, seminar papers, speeches given at public meetings, information provided to government agencies, etc., was so extensive as to destroy any trade secret status that may have existed regarding the computer software which is the subject of the instant indictments. It is axiomatic that the core element of a trade secret must be that it remain a secret. See generally 70 Tex.Jur.3d, § 36 and cases cited therein. However, absolute secrecy is not required. *See Q-Co Industries, Inc. v. Hoffman*, 625 F. Supp. 608 (S.D.N.Y. 1985) (absolute secrecy not required, rather a substantial element of secrecy must exist). In the

instant case appellants rely heavily on the facts detailing disclosure of the work performed in the speech research lab. Certainly, much information was disclosed to various sources through various means. The record reflects, however, from trial testimony by Dr. George Doddington, chief scientist and head of the speech research lab at TI, that the algorithms composing the actual software which is the subject of these indictments, were not disclosed, nor at any time was such disclosure encouraged or authorized. The relevant portion of Dr.

[Schalk and Leonard — 12]

Doddington's testimony follows:[7]

Q. Now, putting the directory listing aside for a moment, let me direct your attention specifically, well first, let me ask you, if, in

---

[7]To facilitate an understanding of the technical terminology referenced in Dr. Doddington's testimony, we offer the following definitions obtained from Suppl, Computer Dictionary (4th ed.):

algorithm - a defined process or set of rules that leads and assures development of a desired output from a given input; a sequence of formulas and/or algebraic/logical steps to calculate or determine a given task; processing rules.

data base - a data base is a collection of data arranged in files used for more than one purpose.

program - a plan for the automatic solution of a problem. A complete program includes plans for the transcription of data, coding for the computer, and plans for the absorption of the result into the system. The list of coded instructions is called a routine. Programming consists of planning and coding, including numerical analysis, specification of printing formats, and any other functions necessary

your 16 years with Texas Instruments in the speech research area, has Texas Instruments ever given out any of it's [sic] speech recognition, speech synthesis, or, speaker verification, or voice verification software, to anybody?

A. Not to my knowledge.

Q. Have you ever personally given out, or authorized the giving out of any of the algorithms?

A. No, never.

Q. All right. And, you were the head of the speech research department?

A. I was the head of the speech research branch, yes.

Q. All right. Now regarding, State's Exhibit, 4-B, 4-C, 4-D, 4-E, and 4-F, the five computer programs that you have identified as coming from tape number four, you wrote them?

[Schalk and Leonard — 13]

---

to the integration of a computer into a system.

software - various programming aids that are frequently supplied by the manufacturers to facilitate the purchaser's efficient operation of the equipment. Such software items include various assemblers, generators, subroutine libraries, compilers, operating systems, and industry application programs.

system - an assembly of components united by some form of regulated interaction to form an organized whole; a devised and designed regular or special method, plan, methodology, or procedure. The organization of hardware, software, and people for cooperative operation to complete a set of tasks for desired purposes.

A. Yes, I wrote these.

Q. Have you, or Texas Instruments, ever given out those five computer programs to anyone, whether or not, —

A. No.

Q. With our without restrictions?

A. Correct.

Q. Have you ever given then out to anybody?

A. No.

Q. Okay. Let me show you, now, the computer programs that you have identified as coming off of tape number 16, State's Exhibit, 16-B, 16-C, 16-D, 16-E, 16-F, 16-G, 16-H, and 16-I, and I'll ask if you, or anybody else at Texas Instruments as [sic] ever provided these, or given these out to anybody outside of Texas Instruments for any reason, whatsoever?

A. No.

Q. State's Exhibit, 17-B, 17-C, 17-D, 17-E, 17-F, I'll ask you if you or anybody else at Texas Instruments has ever given out these five programs that come out of tape number 17?

A. Not to my knowledge.

Q. State's Exhibit, 18-B, 18-C, 18-D, 18-E, 18-F, and 18-G, these computer programs that came off of tape number 18, I'll ask you if you or anybody else at Texas Instruments has ever given those out to anybody without or with restrictions?

A. No, not to my knowledge.

Q. Or provided them to anybody?

A. No.

Q. Again, are those programs that fall within this third area, algorithms?

A. Yes.

Q. Now, you have given out, for limited purposes, some of the data base?

A. Yes.

Q. And, for limited purposes, some of the tools?

A. Some, yes.

[Schalk and Leonard — 14]

Q. But, not the algorithms?

A. Correct.

Q. Now, Doctor Doddington, you wrote all of the programs that we have just talked about in front of the Jury, correct?

A. Yes, some of them were subsequently modified - seventeen, was subsequently modified by Gary Leonard.

Q. But, you were the original author of all of them?

A. Yes.

Q. So, you are familiar with what they can do and what their value is?

A. Yes.

Q. How long would it take a competitor of Texas Instruments in the speech synthesis, and speech recognition areas to duplicate your efforts that were found on tapes 4, and 6, 16, 17, 18, and 19?

A. You mean how long would it take to develop these programs?

Q. How long would it take a competitor to develop those programs?

A. Well, to the best of my knowledge, these programs, or anything similar to them did not exist anywhere except at Texas Instruments.

It's difficult for me an [sic] say how long it would take someone to do this, maybe never, years.

Q. How long—I'm sorry.

A. This is basically a culmination of fifteen years of speech research at Texas Instruments.

Q. Okay. Over that, — well, let's just say that the last ten years of speech research at Texas Instruments, how much money has Texas Instruments invested in this speech research area, that you were working in?

MR. BANKS: Judge, this is repetitious. It's been asked and answered yesterday, I think we got a figure of one to two million dollars a year. It's repetitious.

THE COURT: Overruled.

THE WITNESS: At the rate of approximately one million dollars a year, or sometimes more, in the range of ten to twenty million dollars.

The exhibits referenced in Dr. Doddington's testimony correlate

to the computer tapes and programs under indictment in the instant case.

In *Dickerman Associates, Inc. v. Tiverton Bottled Gas Co.*, 594 F. Supp. 30 (D.C.Mass. 1984), the court held that although

[Schalk and Leonard — 15]

portions of computer software system were disclosed during demonstrations to prospective purchasers, it represented but a small fraction of the whole system and this limited disclosure was insufficient to permit an understanding of the design and architecture of the program. Courts have also held that access to the computer software program by a few customers does not destroy trade secret status. *J & K Computer Systems, Inc. v. Parrish*, 642 P.2d 732 (Utah 1982). *See also* Annot., Computer Trade Secret, 53 A.L.R. 4th 1046, 1072, citing *Ward v. Superior Court*, 3 Computer L. Serv. Rep. 206 (Cal. Super 1972) (program held not generally available to public where owner did not sell details of program itself but only sold remote plotting service that the program made possible).

The instant situation is analogous to *Dickerman* and *J & K*. For example, in a letter transmitting computer software to the USAF Academy, Dr. Doddington stated the following:

Here is a tape containing the most significant software packages that we have in our laboratory that you desired to receive. I have enclosed both documentation and source listings for your use. I hope you find these data to be helpful in setting up your laboratory and structuring your software for maximum efficiency. Please understand that we can not [sic] support this software in any way other than to provide you with the listings as we are doing by sending you the tape.

With this in mind, and considering that the software is sensitive to the exact system configuration, the software that we are sending will probably find best use as a template or guide for helping you to define and develop your own software....

This letter, ironically presented as defendant's exhibit, supports

instead the State's position because it emphasizes the limited nature of the disclosure and is consistent with relevant caselaw on this topic. *O-CO Industries*, 625 F Supp. at 617, quoting *Imperial Chemical Indus. Ltd. v. National Distillers & Chem Corp.*, 342 F.2d 737, 742 (2d Cir. 1965), to-wit: "...[A] trade secret can exist in a combination of characteristics and components, each of which, by itself, is in the public domain, but the unified process and operation of which, in unique combination, affords a competitive advantage and is a protectable secret." We find, based on the record in this case, that the limited disclosures

[Schalk and Leonard — 16]

made by TI in regard to the speech research lab activities merely described the application and configuration of the certain elements of the software but did not reveal the actual composition of the programs.

Doddington testified that disclosure of the programs named in the instant indictments was never authorized. We note that even if TI had authorized disclosure of such programs on a limited basis, trade secret status would not necessarily be destroyed because it could still meet that part of the statutory definition which reads "that the owner has taken measures to prevent from becoming available to persons other than those selected by the owner." (emphasis added). V.T.C.A. Penal Code § 31.05(a) (4).

Plant Security Measures

The measures used by TI to secure its premises to prevent unauthorized personnel from admission to or exposure to its proprietary research data were reasonable under the circumstances. The issuance of identification badges, use of security guards and closed-circuit television monitors, entry to the speech lab limited to small number of personnel, nighttime security checks, etc. are fairly common to research oriented industries. Although these measures relate to the TI plant and not specifically or uniquely to the speech lab, they do affect and serve to limit access to the speech lab, and therefore serve to protect the trade secret status of the information devel-

oped therein.

Computer Software Access

Testimony at trial enumerated detailed restricted user access basically utilizing a series of passwords and restrictive codes in order to access the desired software utilities. Trade secret caselaw dealing with computer software recognizes these types of measures as protective of trade secret status. *See generally*, Annot., 53 A.L.R. 1046, § 7[a] (cases supporting trade secret status for computer software).

Other Measures

The court of appeals listed as one of the preventive measures the fact that the TI Trade Secret Register referred to "speech

processing." Conflicting testimony indicates that the register entry may relate to a different area of speech research than that conducted in the lab by appellants and therefore did not refer to the software programs under indictment. We find the evidence inconclusive to support the theory that the register entry refers to the specific software involved in the instant case. It was also brought out in testimony that the Trade Secret Register was not timely updated and distributed to TI employees in accordance with the company policy manual. Further, the "admonitions" to lab personnel to protect lab software are simply too general in nature to determine whether they should be considered a protective measure. In fact, such "admonitions" were tempered with memoranda and conversations that encouraged sharing of information with others outside TI.

Correlative to the above-mentioned Trade Secret Register and "admonitions" regarding non-disclosure, appellants also claimed that they were not informed by TI that the programs which they worked on at TI and later took with them to VCS were trade secrets. In support of this contention, they point out that the TI Trade Secret Register was not updated and distributed to employees in a timely manner as was required by the company policy manual. They further contend that the "speech processing" entry in the Register is not the speech research with which they were involved. In addition, they

claim that extensive dissemination of certain information destroyed any secrecy that may have existed or been intended. Clearly, the contractual agreements that appellants made with TI gave appellants ample notice that their employment would be directed towards proprietary and trade secret information. Indeed the actual programs they developed were not in existence at the time they signed the initial agreements, so they could not have been named definitively. Granted, a stronger case for the State would have resulted from the naming of the subject programs in the exit interview agreements. Even so, if the programs were trade secrets at time of creation, there is insufficient evidence to suggest that trade secret status was

[Schalk and Leonard — 18]

destroyed prior to the exit interview. Because the exit interview agreement covers trade secrets, and the exit form itself states that it is non-exclusive, listing of the specific programs was not a requirement to maintain trade secret status.

Conclusion

We need not decide today whether any one of the preventive measures listed, standing alone, is factually sufficient to support trade secret status. We do find that the combination of employment agreements, strict plant security, restricted computer access, the non-authorization of disclosure of the subject programs and the general non-disclosure of those programs by TI and its employees served to support trade secret status of the computer programs that are the subject of the instant indictments. Appellants neither requested nor received permission to copy the files containing these programs. The unauthorized copying of an article representing a trade secret constitutes an offense under V.T.C.A. Penal Code § 35.01(b) (2). Therefore we affirm the court of appeals' ruling that the subject programs are trade secrets. Appellants' first ground for review is overruled.

Search Issue

In their second ground for review, appellants contend the court of appeals erred in holding the search warrant sufficiently described the magnetic tapes that were seized and that the tapes were not seized pursuant to a general exploratory search.8 We have reviewed the court of appeals' opinions and, as they pertain to the facts of this case, we adopt its treatment of the appellants fourth point of error. *See Leonard*, 767 S.W.2d at 181-82, and *Schalk*, 767 S.W.2d at 452-53. The court of appeals framed this issue under Art. I, §9 of the Texas Constitution, although also citing federal precedent. In our recent decision in *Heitman v. State*, ___ S.W.2d ___ (Tex.Cr.App. No. 1380-89 delivered June 26, 1991), we expressly concluded that this Court, when analyzing

[Schalk and Leonard — 19]

and interpreting Art. I, §9 of our constitution, would not be bound by decisions of the United States Supreme Court addressing the comparable Fourth Amendment issue. *Id.*, slip op. at p.14. The question of whether our state constitution should provide more protection than the federal constitution in this case was not presented in the appellants' second ground for review, and we therefore express no opinion on that issue. *See Id.*, slip op. at p. 15, fn.23 (Court requires separate ground and substantive analysis on state and federal constitutional claim). With this caveat, however, we approve of the court of appeals' opinion on appellants' fourth point of error, and, thus, we overrule appellants' second ground for review. *January v. State*, 732 S.W.2d 632 (Tex.Cr.App. 1987).

Accordingly, the judgment of the court of appeals is affirmed.

Miller, J.

McCormick, PJ. concurs in the result.

Clinton, J., dissents to disposition of the second ground for review.

Delivered: October 2, 1991
En Banc. Publish.

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

December 4, 1991
COAP 05-86-01171-CR

RE: Case No. 0665-89
State v. Schalk, Thomas Barton

On this day the Appellant's Motion for Rehearing was denied.

Thoras Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308 CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO
JOHN H HAGLER
3601 NCNB PLAZA
901 MAIN STREET
DALLAS TX 75202

COURT OF CRIMINAL APPEALS OF TEXAS
MOTION FOR REHEARING DENIED